No. 220.

Brief of Warner for D. E.

In the Supreme Court of the United States.

Filed Oct. 12, 1899.

October Term, 1899.

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Clerk

THE AMERICAN EXPRESS COMPANY, A Body Corporate, and CHARLES F. REED, *Plaintiffs in Error*, vs. FRED A. MAYNARD, Attorney General of the State of Michigan, at the Relation of GEORGE F. MOORE, *et al.*, *Defendant in Error.*	No. 220

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

C. E. WARNER,
Attorney for Defendant in Error.

POTTER PRINTING CO., DETROIT, MICH.

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BRIEF IN BEHALF OF DEFENDANT IN ERROR.

On May 1st, last, we submitted to this court a motion to dismiss the writ of error, and remand the cause to the Supreme Court of the State of Michigan.

Briefs were submitted upon both sides, and the court postponed further consideration of the motion until the hearing of the case upon the merits.

It was there contended that the issue, as raised by the respondent, did not involve or draw in question the validity or construction of a statute of the United States, or a right, title, privilege or immunity set up or claimed thereunder; but, on the contrary, only the common law right of the Express Company as a common carrier, to *regulate its rates* by imposing increased burdens upon ship-

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pers, in view of the tax which the act of Congress had imposed upon it.

We press this phase of the controversy upon the court's attention, and submit that when the pleadings of the respondent, under which the issue is raised, are critically examined, it will be found thet no "*Federal right*" is, in effect, asserted, but rather an alleged *common law* right to raise its rates to meet the requirements af the Stamp Act.

We refer the court to the brief in behalf of the defendant in error, furnished upon this motion.

Should the court not agree with us in this contention, then, we submit, upon the merits of the controversy, that the decision of the Supreme Court of Michigan, (77 N. W. Rep., 317,) holding that it is the duty of the Express Company under the "*Express and freight* provision of Schedule A," of "An Act to Provide Ways and Means to meet War Expenditures, and for other Purposes," passed June 13th, 1898, to affix the stamp, without requiring the shipper to pay therefor, was and is correct.

The respondent, the American Express Company, is a joint stock association, organized and existing under the laws of the State of New York, and having its principal business office located in the City of New York, in said State, and is a common carrier, transacting the express business, so-called, and engaged in the business of receiving, carrying, forwarding and delivering goods, wares and merchandise.

The company is doing business in Michigan, under and in pursuance of a permit and license issued by the State Treasurer of the State, under and in pursuance of the provisions of *Chapter 103 of Howell's Annotated Statutes.*

The company complied with the terms and provisions

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of the Act, and thereupon received a permit and license to do business in the State of Michigan, and to receive, accept and transmit packages, from point to point, throughout the United States.

On June 13th, 1898, the Congress of the United States enacted a Revenue Law, so-called, entitled, "An Act to Provide Ways and Means to meet War Expenditures, and for other Purposes."

Section 6 of said Act, provides as follows:

> "Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid for, and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described *in Schedule A of this Act*, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed, by any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."
>
> "Sec. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive

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stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not more than one hundred dollars, at the discretion of the court, *and such instrument, document or paper as aforesaid, shall not be competent evidence in any court.*"

Schedule A of said Act, among other things, provides as follows :

"Express and Freight : It shall be the duty of every railroad or steamboat company, carrier, *express company* or corporation, or person whose occupation is to act as such, *to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles or not so enclosed or included ; and there shall be duly attached and canceled, as is in this Act provided, to each of said bills of lading, manifest, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent :* Provided, That but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, *shall subject such railroad or steamboat company, carrier, express company or corporation, or person,* to a penalty of fifty dollars for each offense, *and no such*

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bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The respondent, upon the delivery of packages to it for transportation as a common carrier, refused to *accept* goods for transportation, *unless the shipper or consignor would pay or provide for the stamp provided by said Act.* This act, upon the part of the express company, *was general and uniform.*

Packages of merchandise were offered to the express company for transportation by the several relators mentioned in the petition herein, and the company refused to accept such goods for transportation, unless such stamp was paid or provided.

Therupon, Fred A. Maynard, Attorney General of the State, upon relation of the several firms and persons mentioned in the petition, presented a petition to the Circuit Court for the County of Wayne, for a *mandamus* to require the respondent to receive, accept, transmit and deliver goods, wares and merchandise, duly offered or tendered to it for transportation, when the fees and charges for such goods were offered, paid or tendered, and to issue to the shippers or consignors a bill of lading, manifest, or other evidence of receipt, and forwarding of each shipment, with the stamp duly attached thereto, as provided by said Act of Congress.

This petition set forth in substance :

1. That the Express Company was a joint stock association, as aforesaid.

2. That it was a common carrier, transacting the express business, and was engaged in the business of receiving, carrying, forwarding and delivering goods for hire, on behalf of all persons, &c.

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3. That on Jan. 29th, 1897, (the date of its last report,) said company had 498 agencies in the State of Michigan alone, at which said agencies the company received goods, wares and merchandise for transportation to various points in the State of Michigan, and throughout the United States, and was then, and still is, a common carrier, holding itself out to the public as authorized to receive, carry and deliver such boxes, bales, &c.

4. That the business of said company was large and lucrative, and that by the report of the company, filed in the office of the State Treasurer, on Jan. 29th, 1897, the company represented that its business was represented by 180,000 shares, and that the working fund of the association was fixed at $5,300,000, and the amount of the gross receipts for the then current business in the State of Michigan for the year ending December 31st, 1896, was the sum of $130,459.25.

5. That Chapter 103 of Howell's Annotated Statutes of the State of Michigan, provides that it shall not be lawful for any person or persons to act within this State as agent or officer, in transacting the express business, &c., without first procuring a certificate of authority or license from the State Treasurer, and that before obtaining such certificate the company was required to furnish the State Treasurer, annually, in the month of January, in each year, with a statement, under oath, of the matters required by said statute.

That thereupon, the Express Company, association, firm or corporation, complying with the requirements of said act, and receiving such certificate, was and is permitted to do business freely in any part of the State.

6. That the company had substantially complied with the terms and provisions of said act, and thereupon received such permit, and was authorized to do business in

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the State, and to receive, accept and transmit packages, and that it was the duty of respondent to so receive, accept and transmit such packages, when duly offered or tendered to it for that purpose, and the charges paid or tendered.

7. That the business of said corporation is of a public or *quasi* public character, and a public function used and exercised by said company for the people at large throughout the State of Michigan, as well as other States of the United States, and in which the public has a substantial interest, and the abuse or misuse of which is of a substantial nature.

8. That the persons, at whose relation the proceeding was instituted by the Attorney General of the State, constitute a portion of the people of the State of Michigan, and the public at large ; and that the refusal of the respondent to receive, accept and transmit goods, wares and merchandise, in said petition more particularly stated, constituted but a few out of many cases of like character, *and were presented for the purpose of representing the uniform course and practice of the respondent company.*

9. That on June 13th, 1898, Congress passed the Act which is hereinbefore referred to.

10. That by reason of a desire of the respondent to avoid the payment of the stamp tax, and to impose such obligations on the shipper, the respondent refused to accept any goods for transportation unless such shipper attached the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnished the money and means for that purpose; and that the said company thereby not only avoided its duty under the Act of Congress to pay and bear its proportion of the revenues to meet war expenditures, *but*

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violated its duty as a common carrier to receive, accept, transport and deliver such goods, wares and merchandise so offered and tendered to it for that purpose.

[This paragraph was and is supported by specific allegations of tender and refusal upon the part of the Express Company.]

11. That the above and foregoing constituted but a few of many instances of like character, *and that it is the uniform course and practice of the respondent to refuse to receive, accept, transport, carry and deliver such goods, wares and merchandise, in boxes, bales, packages, bundles or otherwise, unless the said stamp tax was paid or provided by the shipper.*

12. *That the respondent substantially refused to discharge its duty as a common carrier, and has, to a material degree, suspended the exercise of its functions and franchises, by refusing to take goods, wares and merchandise, in boxes, packages, &c., which have been offered and tendered to it, at its places of business, for transportation at the usual rates, and upon the usual terms;* and has refused to accept and transport a great part of such goods, wares and merchandise, except upon the consent of the shipper to pay the stamp tax, whereby great loss and damage has accrued to the people of the state, and the trade and commerce of the people of the state is greately injured by the refusal and neglect of the respondent to perform its duties as common carrier, unless the stamp tax was paid by the shipper.

The respondent filed an answer, in which the material allegations of the petition were substantially admitted, but the respondent submitted that under the terms of said Act of Congress, it was not made respondent's duty to pay said tax, only when some party, who would be a shipper,

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mutually agreed with respondent to enter into the relation of shipper and carrier, and said party had tendered for shipment some article to be carried by defendant, which it had accepted for that purpose.

By paragraph 4 of its answer, it is alleged that in any cases of pretended violation of its duties, as set forth in the petition, it was not pretended or alleged that the charges were paid or tendered, but this point, as appears by the opinion of the Circuit Judge, (a copy of which is attached hereto,) was abandoned upon the argument, and the cause was left for the court below to decide the same as if the charges had been tendered, so that such question was eliminated from the case. See opinion of the Circuit Judge.

The answer further sets up, in substance:

(a) That it is the policy of all taxation laws that such burdens imposed thereby shall be as generally and equitably distributed as possible.

(b) That the respondent, by its organization, in compliance with the laws of the State of Michigan, became vested with the right to exist in a corporate capacity, and to regulate the carrying on of its business by reasonable rules and regulations, and to fix and insist upon the payment of such rates of transportation as it deemed best. Par. 7.

(c) That the enactment of the Stamp Act made it necessary for respondent to change and regulate its method of transacting its business, and to re-establish its rates of transportation, and respondent therefore decided to raise, and did raise, its rates of transportation, to an amount reasonable and just, and only necessary to meet the change of conditions made by the act, and save itself from great loss of revenue and profit as compared with its earnings before the passage of said act. Par. 8

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(d) The respondent alleged that under its right to regulate its manner of doing business, and to regulate its rates, respondent has accorded to responsible shippers the right to pay such increase, either using a stamp or money for the purpose, upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee. Par. 9.

(e) *That respondent admits that the regulations of its business affairs, and change in its rate of transportation, throws the burden of the said tax upon the shipper, by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to.*

ARGUMENT.

I.

The relator contends that the respondent is a common carrier, and that, as such, it is its duty to *accept and receive* for transportation, all packages of merchandise tendered to it for transporation, when the fees for so doing are paid or tendered.

The respondent declines to "*accept*" such packages for transportation, unless the stamp tax imposed by congress is paid by the shipper.

The relator contends, upon the other hand, that the express company is a common carrier, and cannot avoid its duty as such to the public, by imposing upon the shipper the payment of an obligation which the law has imposed upon it, and that such company cannot, under the guise or pretense of raising its rates, cast this burden or

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obligation upon the public, and thereby avoid its own duty.

The respondent is a common carrier, and as such it is its duty to receive for carriage, and to carry the goods of any person, tendered to it for transportation, provided they are such as it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Edition, pp. 158-159.

See also

Am. & Eng. Ency. of Law, Vol. 7, 1st Ed., p. 543, et seq.

Chicago, &c., R. Co., vs. Suffern, 129 Ill., 274.

Peoria, &c., R. Co., vs. Chicago, &c., R. Co., 109 Ill., 135.

Louisville, &c., R. Co., vs. Flanagan, 113 Ind., 488.

Messenger vs. Railroad Co., 37 N. J. L., 531.

The duty of a common carrier to accept for transportation all goods properly tendered *is one imposed by law*, arising out of the relation the carrier sustains to the public; and it is not necessary to allege or prove any special contract to carry.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Ed., p. 160.

Doty vs. Strong, 1 Pin., (Wis.), 313; 40 Am. Dec., 773.

Adams Express Co. vs. Nock, 2 Duv., (Ky.), 562; 87 Am. Dec., 510.

The law imports into the contract for the transportation of goods, *an implied obligation to ship within a*

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reasonable time after the goods have been delivered for that purpose; and this element becomes a substantial provision of the contract, as much as if it had been expressly written in it, and its effect cannot be changed, altered or modified, by parol.

Penn. Co. vs. Clark, 2 Ind. App., 146.
Rankin vs. R. R. Co., 55 Mo., 167.

"Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. As they hold themselves to the world as common carriers for a resonable compensation, they assume to do and are bound to do, what is required of them, in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price."

In Re 318 1-2 Tons of Coal, 14 Blatch., 453-458.

And a common carrier cannot avoid its duty to the public, by "*regulations.*"

Southern Express Co. vs. Moon, 39 Miss., 822.
Garton vs. Railroad Co., 1 B. & S., 112.

Nor can the duty be avoided by a requirement of the company which is not a reasonable one.

In Re 318 1-2 Tons of Coal, Supra.

Michigan Central Railroad Co. vs. Ward, 2 Mich., 540:

In this case, the court, in construing the liablility of common carriers, says:

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> "In the absence of any special contract, or local custom, or usage of particular trades, governing or controlling the action of the parties, it is incumbent upon a common carrier, by the rules of the common law, to deliver the goods entrusted to his care to the consignee personally, and, until such delivery, he does not discharge himself from the obligations and duties the law imposes upon him."

In Michigan Central Railroad Company vs. Hale, 6 Mich , 243, the court held *that a common carrier has no power to restrict, in any manner, his common law liability*, but is bound to transport the property entrusted to him under this liability, if it be not waived or changed by contract.

At page 257, the court, in referring to the liability of the railroad company as a common carrier, say:

> "It was made their duty to transport property for all persons indifferently; *and this they cannot refuse to perform.* This duty is, in the absence of any contract, attended with extraordinary responsibilities and liabilities, which constitute them insurers of property while in their possession as carriers, and they can no more restrict these, unless upon the free and full agreement of the party dealing with them, than they can refuse to carry when required."

In *McMillan vs. Railroad Co., 16 Mich., 79*, the court holds that carriers cannot limit their liability by a mere notice published, or posted, or otherwise brought to the knowledge of the consignor; *nor can they refuse to receive*

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property for transportation, unless the consignor will agree to enter into a special contract therefor.

See, also,

Grand Rapids, &c., R. R. Co. vs. Huntley, 38 Mich., 546.

II.

The respondent contends that under the act of congress, properly construed, it is not made respondent's duty to pay the tax only when some party, who would be a shipper, mutually agrees with respondent to enter into the relation of shipper and carrier; but it will be seen from the foregoing citations that the carrier cannot refuse to receive property for transportation, unless the consignor will agree to enter into a special contract therefor. In other words, the liability of the common carrier is imposed when goods are tendered to it for transportation.

The duty is one imposed by law, arising out of the relation the carrier sustains to the public. The law imports into the contract an implied obligation to ship within a reasonable time, and its effect cannot be changed, altered or modified.

The duty to pay the tax, under the provisions of the act of congress, has been clearly imposed upon the *carrier*, and not upon the shipper. We think every government officer or court which has been called upon to construe this law has, thus far, so decided. The act itself clearly indicates this. Stripped of unnecessary verbiage, the act is as follows:

> *"It shall be the duty of every" * * * "express company" * * * "to issue to the shipper or consignor, or his agent or per-*

son from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding, for each shipment received for carriage and transportation, whether in bulk, or in boxes, bales, packages, bundles, or not so enclosed or included, and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent."

The law imposes upon the *carrier* the obligation to *issue* the receipt. This is an act with which the shipper has nothing to do. He takes a package to the company for transportation and tenders the usual or customary fees. There his relation ends. The duty of the carrier then springs into existence, and that duty is to issue to the shipper a receipt, &c. "*And there shall be duly attached and canceled to each of said bills of lading,*" *&c., a stamp of the value of one cent.*

Under the provisions of section 7 of the Act, no instrument, document or paper shall be competent evidence, in any court, without having thereupon such adhesive stamp, to denote said tax.

Section 14 likewise provides that no such paper, "which has been signed or issued without being duly stamped, or with a deficient stamp, shall be recorded or admitted or used as evidence in any court, until the legal stamp denoting the amount of tax shall have been affixed."

It seems to us that a reading of this law, with a fair consideration of its objects and purposes, will clearly indicate that the obligation to *issue* the receipt, bill of lading or memorandum, is upon the ~~shipper~~ carrier, and that this receipt, bill of lading or memorandum, *is not a legal instru-*

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ment, which the law requires to be delivered to the shipper, *until the adhesive stamp is affixed.*

It will, we think, be unnecessary to discuss the contention of respondent's counsel, that it is the policy of all taxation laws, that the burdens imposed thereby shall be as generally and equitably distributed as is possible, in order that such tax burden may be cast upon the many, as a small burden, rather than a large one, upon the few.

This abstract proposition may well be admitted as a governmental policy, *but we deny the right of the respondent to avoid the obligation which Congress has thrown upon it, under the so-called regulation of rates*, as indicated in paragraphs 9 and 10 of respondent's answer, wherein respondent admits "*that the regulation of its business affairs, and change in its rate of transportation, * * in effect, throws the burden of the tax upon the shipper by force of circumstances.*"

It may well be contended by the relator, that the people of the state, which includes the great body of shippers, are paying, without objection, the taxes for war expenditures, *which the Act of Congress has imposed upon them*, and that these burdens are sufficient for them, without being required, under the so-called "*regulation of rates*," to bear the burden which Congress has imposed upon the express companies.

It will be noted that the Act is somewhat peculiar. While the Act imposes a penalty for its violation, yet the Act is peculiar in that it requires the express companies to pay the stamp tax upon goods "*accepted for transportation.*"

The government, therefore, refuses to proceed against express companies for a violation of the Act, *unless it be made to appear that the company has accepted for transportation* such goods for shipment, and has thereupon refused to attach the stamp. It is, therefore, incumbent

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upon shippers to *compel* the express companies to perform their duties as common carriers, by accepting such goods for transportation, and such goods being accepted, and the stamp tax then not being affixed, the government is ready to prosecute such companies for a violation of the law.

The question, as will be observed, is a new question arising under the Act of Congress, and relators' contention cannot, therefore, be fortified by adjudicated cases of courts of last resort.

The question has, however, been decided in favor of relators' contention, by Judge Tuley, of the Superior Court of Cook County, Illinois, in the case of *People ex rel Western Wheel Works vs. The United States Express Company*, reported in the Chicago Legal News, Vol XXX, No. 49, July 30th, 1898, p. 408, in which the learned Judge holds, in substance:

(a) That the Federal War Revenue Act, so far as applied to express companies, is the exercise of the power to tax the business of the express companies, by way or by means of imposing a stamp tax on its bills of lading or receipts, which it is compelled to use in the transaction of its business.

(b) That the law requires the express companies to issue the receipt to the shipper, and as a part of such issue, contemplates the affixing and cancellation of the stamp.

(c) That when the increased cost of handling and transportation demand it, a common carrier has the right to revise and increase its rates, but it cannot arbitrarily do so in order to make its customers or the public pay a tax imposed by law on such carrier, or upon the business transacted by it.

(d) That a horizontal increase of one cent per ship-

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ment, whether it be for a long or short distance, is not a "*revision*," or permissible increase of rates.

We take the liberty of publishing the opinion, in full, as an appendix to this brief.

In the case at bar, the Hon. Robert E. Frazer, the learned judge who heard the case in the court below, filed an opinion, wherein it is held, that it is manifest that it was the intention of Congress to require the express companies to deliver to the person offering for shipment any goods or packages, a receipt for the same, and that it requires such receipt to have attached to it a revenue stamp of one cent. That this makes it clear that it is the duty of the express company to deliver to such shipper, a full and complete receipt, *and a receipt would not be full and complete, or legal, unless it had attached to it and canceled, a revenue stamp of the value of one cent.*

Further, that that right to determine and make reasonable charges for the transportation of goods, is a different thing from the increase of rates which had theretofore been deemed reasonable, for the purpose of avoiding the payment of the tax directed by Congress for the raising of revenue for the carrying on of the war; and that the increase was not in any sense for the purpose of meeting any additional expense that the express company might be put to, but was added for the express purpose, as was practically admitted, of transferring the burden of paying a portion of the revenue necessary to carry on the war, from the shoulders of the express company to those of its patrons, and that the raising of the rate of one cent upon each package, was, in effect, to impede the operation of the law, and therefore illegal.

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We also take the liberty of appending hereto, a copy of the opinion of the learned Circuit Judge.

The Supreme Court of Michigan carefully considered this question, and in an opinion by Mr. Justice Long, concurred in by the entire court, (77 N. W. R., 317-320,) say:

"The main question in the case relates to the construction to be placed upon the act in question. By the act every express company is compelled to issue to every shipper or consignor, etc., a bill of lading for each shipment received for carriage, to which bill of lading, and duplicate thereof, there shall be attached and canceled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. With this the shipper has nothing to do. He delivers the package to the company, and pays or tenders the usual charges. This ends the shipper's duty, and the law then compels the carrier to issue the receipt or bill of lading. This bill must be stamped, and the stamp canceled. It is evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it, as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier, so failing, amenable to a heavy penalty. But it is contended by counsel, in a brief filed with this court, that the penalty was dircted, and intended by Congress to be directed, to the failure to issue the receipt, and nothing more, leaving the question of the stamping of the same to be settled by the parties. It seems to us that what is meant by this clause is, that the receipt must be such as is provided—that is, a receipt bearing the proper stamp—and that the penalty is provided for such a failure as this. It is, and always has been, the custom of express companies to issue receipts for goods delivered for shipment. The only interest the

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government has or can have is the affixing and cancellation of the stamp to aid it in its war revenues. We are therefore led to the conclusion that the duty to issue the receipt, and the penalty affixed for the failure to do so, imply that it is to be a receipt which would bring the government the revenue provided. Therefore, the act makes it the duty of the company to affix the stamp."

Referring to the contention of the company, that it had the right to make new regulations and establish new rates to meet the additional burden imposed upon it by the Act of Congress, the court say:

"It is conceded that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shippers the burden which the Act of Congress puts upon the company. This is but an evasion, and a subterfuge to avoid the terms of the act. The pretense that raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously. If the charges established were regarded as too small, it would seem that the action would have been to make the additions in some manner to correspond to the length of carriage, weight, etc., but to add one cent to every charge for carriage bears upon its face evidence of the attempt to evade the act. Where the charge established was 25 cents, it is now 26 cents; where it was 50 cents, it is now 51 cents; where $1, it is now $1.01, and so on; adding just 1 cent to each charge. It cannot be that this was done because the charge was too low for each carriage, however long the distance, or however

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weighty the article. The statement of this claim is its own refutation. We are aware that Judge Lacombe, of the United States Circuit Court of New York, has held the other way upon this question, in the case of Merchants' Ass'n of New York *vs.* Adams Express Co.' Fed. , as also the United States Circuit Courts of North Carolina and California; but we are unable to agree with those cases. Judge Tuley, in the Superior Court of Cook County, Illinois, has, however, held in accordance with our views here expressed. It is said by him that 'it is not in fact a revision or increase of rates, but an arbitrary attempt of the company to make the shippers pay a tax which the law requires the company to pay. The court must regard the substance of the contention, and not the pretense.' "

Read in connection with the ordinary common law obligation of the Express Company as a common carrier, there are two duties imposed upon the carrier:

First. To receive for carriage, and to carry the goods of any person tendered to it for transportation. (See cases cited.)

Second. To issue to the shipper * * * a bill of lading, manifest or other evidence of receipt and forwarding, for each shipment received for carriage and transportation.

> "*And there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifest or other memorandum, and to each duplicate thereof, a stamp of the value of one cent.*"

The duty to receive and the duty to issue the bill of lading, manifest, &c., are correlative; one follows the other. The duty to issue a *legal* receipt is imposed upon

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the carrier by the Act of Congress. The receipt is not *legal* unless the stamp is attached. Nothing can be drawn from the Act showing any intention upon the part of Congress, either express or implied, to impose the obligation upon the shipper.

The law imposes the obligation upon the company to issue the bill of lading, manifest or other evidence of receipt and forwarding to the shipper; and *section 7* of the Act provides, in substance, that if any person shall issue, or cause to be issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine, &c., "*and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court.*"

If the Act imposes upon the company an obligation to *issue* the receipt, and at the same time imposes a criminal liability for issuing such receipt without the same being duly stamped, then the inference would seem to logically follow, that the issuing and stamping of the receipts are correlative obligations, and that the express company is, therefore, driven to the position that they are not bound, under the Act, to *accept* goods for transportation unless the stamp is prepaid by the shipper. In other words, that the company can avoid its common law obligation to receive and transport goods of this character by imposing upon the shipper the obligation to do what the Act imposes upon the company itself.

The statement of this proposition would seem to bear its own refutation.

The paragraph dealing with the "Express and Freight" provision of the Act is one dealing with carriers as such. It does not undertake to determine under what circumstances the carriers shall "*accept*" goods for transportation. They are left in this regard to their common law

obligation, but it does distinctly provide that when such goods are accepted for transportation, the express companies shall issue the receipt; *i. e.*, a legal receipt, to which shall be attached the stamp in question.

That the tax is intended to be imposed upon the express business as such, is clearly the view of the Treasury Department. Hon. N. B. Scott, Commissioner of Internal Revenue, in a decision under date of Aug. 25th, 1898, (Treasury Decision, No. 19,965,) in reply to an inquiry in behalf of the Expressmen's League of Massachusetts, as to whether the short local express lines represented by such League, came within the provisions of the Act, says:

> "In reply, you are informed that the Act of June 13, 1898, in its provisions requiring stamped bills of lading to be issued by express and freight companies to shippers of goods accepted for trasportation, does not apply to individual persons, firms or local companies delivering packages, parcels, bundles, railway baggage, and the like, solely on call and at special request, in the various localities, but within city limits, adjacent to their own place of business. *It is only upon the transaction of an express business conducted upon regular routes and designated times*, upon regular trips and as a business of carriage and transportation from one point or place in the country to another point or place, *that the requirement of the law to issue to the shipper or consignor from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received, and to stamp the same, applies and is imposed.*"

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By Treasury Decision No. 19,803, under date of Aug. 1st, 1898, the Commissioner regards it as the duty of the carrier to stamp the bill of lading or receipt, *in case it accepts the merchandise for transportation*, but the question of the obligation of the carrier to *accept*, is left to the common or statute law of the state. He says:

Treasury Decision No. 19,803, Vol. 2, p. 234.

BILLS OF LADING.

Duty of carrier to furnish the shipper a stamped bill of lading or receipt—has a remedy in case of refusal.

"Treasury Department,
Office of Commissioner of Internal Revenue,
WASHINGTON, D. C., Aug. 1, 1898.

SIR: Your letter of June 30th, to the Secretary of the Treasury, was by him referred to this office for reply. An enormous pressure of similar inquiries has hitherto prevented consideration of your letter.

You ask as to whose duty it is to pay the expense of the stamp required for bills of lading or receipts given by common carriers.

I answer that the carrier who accepts merchandise for transportation is required to furnish the shipper a stamped bill of lading or a receipt therefor. If he fails to do this, he incurs criminal liability; but if he refuses to accept the goods for transportation, except on condition that the owner or shipper shall pay the sums necessary to purchase the stamp or stamps, in addition to the customary charge for the transportation, the war revenue law provides no remedy; nor does any internal revenue law. *It would seem that, in such cases, the aggrieved party must depend upon the common or statute law of the state defining the obligations of common carriers.*

Respectfully yours,
N. B. SCOTT,
Commissioner."

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And the Hon. John W. Griggs, attorney general, says:

"Office of the Attorney General,

WASHINGTON, D. C., Aug. 16, 1898.

COL. JOHN J. McCOOK,

No. 120 Broadway, N. Y.

DEAR SIR: Replying to your letter of the 13th inst., I have the honor to advise you that the attitude taken by the Department of Justice with reference to the question as to which party, the shipper or the express company, under the war revenue bill, is required to furnish and pay for the revenue stamp, which is required to be placed upon the manifest or bill of lading, is, that this is a matter entirely between the shipper and the company. This office holds that, so far as the government is concerned, it is only interested to know that the lawful tax is paid. As between the shipper and the express company, I have decided that the matter is not within my province of consideration under any case that has yet arisen. The United States District Attorneys are instructed by this office that they may prosecute, for the prescribed penalty, any company which issues a manifest or bill of lading without the prescribed stamp; but that in controversies arising between the shippers and express companies as to which one shall be required to bear the expense of the stamp, the government has no direct concern under the war revenue law.

Very respectfully yours,

(Sgd.) JOHN W. GRIGGS."

As we have seen, the law imposes the obligation upon the shipper to issue the receipt. The affixing of the stamp is one step only in the issue of this receipt. It differs in no material respect from any other act required in the issue. The company is the maker of the instrument.

In construing the act of '66, Commisioner of Internal Revenue Rollins, says:

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> "It is the duty of the maker of an instrument to affix the stamp thereto, and to cancel the same in the manner required by law."
>
> *4 Int. Rev. Rec., p. 61;*
> *4 Int. Rev. Rec., p. 164.*

In *Latham vs. Smith, 45 Ill., 25-26*, in speaking as to the necessity of attaching the stamp by the maker of an instrument, the court say:

> "If necessary, the note was as incomplete (without the stamp) as if it had lacked the maker's signature, and the attaching and canceling it without authority would be as unauthorized as writing the maker's name to the instrument without authority. If that is important, it is the last act essential to its validity, and is as much the act of the maker, as is the signature."

In *Myers vs. Smith, 48 Barb. (N. Y.) 614-636*, the court, in construing the Internal Revenue Act of 1864, (U. S. Statutes 1864, Chap 173, Sec. 151,) say:

> "It is clear to my mind, that the person executing the document which requires the stamp, is the one to affix it, and that in any event it cannot be affixed, nor the cancellation be made by another party, without the actual knowledge, and the express or implied consent of the party who issues the paper on which the stamping is placed."

In *Blunt vs. Bates, 40 Ala., 470-3*, in construing this act, the court say:

"Under the stamp act, if the note was made in the United States, it was the duty of the maker, at the time it was executed, to stamp it and cancel the stamp, and upon

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his failure, the payee was authorized, in certain cases, to do so."

COMPARISON OF STAMP ACTS.

A comparison of the stamp acts of 1862, 1863 and 1864, with the Act of 1898 may aid in the solution of the question.

Section 94 of the Act of 1862, (U. S. Statutes at Large, Vol. 12, p. 475,) provides as follows:

"Sec. 94. And be it further enacted, that on and after the first day of October, 1862, there shall be levied, collected and paid for and in respect of the several instruments, matters and things mentioned and described in the schedule (marked "B") hereunto annexed, or for or in respect of the vellum, parchment or paper upon which such instrument, matters or things, or any of them, shall be written or printed by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several duties or sums of money set down in figures against the same respectively or otherwise specified or set forth in the said schedule."

"Sec. 95. And be it further enacted, that if any person or persons shall make, sign or issue, or cause to be made, signed or issued any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the duty hereby imposed thereon, or without having thereupon an adhesive stamp to denote such duty, such person or persons shall incur a penalty of fifty dollars, and such instrument, document or paper aforesaid, shall be deemed invalid, and of no effect."

(These sections are substantially the same as sections 6 and 7 of the act of June 13, 1898.)

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Section 105, p. 478:

"Sec. 105. And be it further enacted that on and after the date on which this act shall take effect, no express company, or its agent or employee, shall receive for transportation, from any person, any bale, bundle, box, article or package of any description, without either delivering to the consignor thereof a printed receipt having stamped or affixed thereon, a stamp denoting the duty imposed by this act, or without affixing thereto an adhesive stamp or stamps denoting such duty, and in default thereof, shall incur a penalty of ten dollars, provided," &c.

Schedule B, p. 481.

"*Express.* For every receipt or stamp issued, or issued by any express company or carrier, or person whose occupation it is to act as such, for all boxes, bales, packages, articles or bundles, for the transportation of which said company, carrier or person shall receive a compensation of not over twenty-five cents, one cent.

"When such compensation exceeds the sum of twenty-five cents, and not over one dollar, two cents.

"When one or more packages are sent to the same address at the same time, and the compensation therefor exceeds one dollar, five cents."

This act, in so far as it applied to Express Companies, continued in force until March 3rd, 1863, when such act was repealed, and a gross tax was imposed upon the receipts "*of such express business,*" *as follows:* (*U. S. Revised Statutes at Large, Vol. 12, p. 722, Section 10.*)

"Section 10. And be it further enacted, that on and after the first day of April, 1863, any person or persons, firms, companies or corporations, carrying on or doing an express business, shall, in lieu of the tax and stamp duties imposed by existing laws, be subject to, and pay a duty

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of two percentum on the gross amount of all the receipts of such express business, and shall be subject to the same provisions, rules and penalties, as are prescribed in section 80, of the act to which this is an amendment, for the persons, firms, companies or corporations, owning or possessing, or having the management of railroads, steamboats and ferryboats; and all acts or parts of acts inconsistent herewith, are hereby repealed."

This latter act continued in force until June 30th, 1864, when Congress passed another act (*U. S. Revised Statutes at Large, Vol. 13, p. 276*:)

"*Express Companies.* Sec. 104. And be it further enacted, that any person, firm, company or corporation, carrying on and doing an express business, shall be subject to, and pay a duty of three percentum on the gross amount of all the receipts of such express business."

The intent of Congress under the previous acts of 1862, 1863 and 1864, would seem to be clear; that is, to impose the tax upon the companies themselves; or, in other words, upon the "express business."

The act of 1862, providing for a stamp upon every receipt issued by an express company, and of 1863 and 1864, imposing a gross tax upon the earnings of the company, were clearly taxes to be paid by the express companies.

The history of these different enactments is well stated by Mr. Seward in his brief in the case of *DeBarre vs. Livingstone, 48 Barb., (N. Y.) 511-515*, where, after considering the various acts, he says:

"So the companies found themselves doubly taxed; once on their gross receipts, and once for the stamp duty so specifically laid in Schedule B, as to exclude the idea they were also to pay a further duty of five cents as an agreement stamp.

"The companies rebelled against this, and refusing to stamp, were sued, and their agents were indicted. Appli-

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cation was made for relief to the commissioner, upon the ground that Mr. Fessenden, then Secretary of the Treasury, had advised the companies that the imposition of a stamp duty on their receipts, was unintentional, and that they need not comply with the law.

"The commissioner was also asked what amount of stamp was required to be placed upon the express receipts. His answer was as follows: * * * 'I think that the excise act requires that each particular receipt shall be stamped with a two cent stamp, and that I have no authority to accept a composition for the amount of duties which have accrued, or which shall hereafter accrue, exeept by way of compromise of suits that have been instituted. An unstamped receipt is not admissible as evidence, and therefore cannot be used as a discharge of the company, nor can it be used for any purpose in a court of justice.

"The express companies complied with this decision, and used a two cent stamp until the next session of Congress, *when they applied to be relieved therefrom.* Such relief was granted by the act of Congress of March 3rd, 1865, entitled, 'An Act to amend the Act' of June 30th, 1864. * * * * Since this act went into effect, the express companies have not been required to stamp their receipts."

The court held in that case, that a receipt, such as is usually given by express companies, was not an agreement within the meaning of the stamp act requiring a stamp of five cents; and, among other things, say:

"The act of 1863, repealed all duties by way of stamps against express companies, and substituted in its place, a duty of two per cent. on the gross amount of all receipts of the express business, and all acts unconnected therewith were repealed."

"The act of 1864, which was a new act in place of the former internal revenue act, again enacted a duty of two

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cents on receipts for property to be delivered, which were again excepted from liability, to a stamp of five cents on an agreement. But this was in 1865, again relieved by an exception in favor of these companies. This whole course of legislation shows that the receipts ordinarily given by these companies was not intended to be changed at any time beyond two cents duty, and while the duty on the gross receipts was exacted that no duty was to be charged on the receipt."

The stamp act of 1898, is a practical repetition (except as to amount) of the acts of 1862, 1863 and 1864, enacted for like purposes, and it would seem when the history and purposes of these two acts are considered, that it was clearly the intent of Congress to impose this tax *as a tax upon the business of transportation*, and that it was clearly intended that the receipt for merchandise should be issued and stamped by the carrier.

There is reason for such a construction. These express companies are public corporations or associations, and carry on their business through public franchises, agencies and privileges. They receive governmental protection, and should bear their proportion of the public burdens imposed by the war revenue act, the same as the humble citizen who receives similar protection. No reason has been urged, and we are aware of none, which should exempt a corporation of this character from sharing the burdens of important governmental functions, the same as the individual citizen.

Bearing upon this phase of the question, we take the liberty of quoting the following from Mr. Commissioner Atkinson, State R. R. Commissioner of Georgia, who states the reasons for imposing this liability on the express companies as well as other public agencies, clearly, forcibly, logically, and we submit irresistibly.

"Aside from these considerations, when we take the

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broader view and consider the circumstances under which, and purposes for which this bill was passed; when we consider that the country was just engaging in a conflict with a great and powerful nation, that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment, and that, in order to raise this money, it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns are required by the system of stamp taxation devised, to contribute to this common fund; that it is so far reaching in its effect, that none could escape the exactions of the tax gatherer, it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction, and taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax, he is excused from all contribution to the general fund, for while other corporations are taxed upon special transactions, and upon gross and net receipts these corporations are exempted from that class of taxes, and throughout the whole scheme of this elaborate piece of legislation, there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose, would be to deny to it credit for either patriotism, or a proper sense of justice. The better conclusion is, that when the Congress required carriers to issue a bill of lading to every shipper, its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers, and since affixing the stamp, was necessary to the completion of such a bill of lading, the

duty was by necessary implication, imposed upon the carrier, of furnishing and canceling it."

Telephone companies, are required under the act, to pay a tax of one cent upon each message transmitted over their respective lines, for which a charge of fifteen cents or more was imposed, and no reason is perceived why a public agency of this character should be required to pay the stamp tax, while another public agency, carrying or transmitting packages, instead of messages, should escape the obligation of sharing this public burden.

Each is alike interested in vindicating and protecting the national honor, and each alike receives the benefits which spring from it.

The act of 1898, in question, has received the interpretation of various officials connected with either the state or national governments, and so far as we are aware, such interpretation is uniformly in favor of the contention that the tax is imposed against the express companies, and that such companies must affix the stamp.

The matter is very clearly presented by the Railroad Commission of Georgia, in a proceeding against the Southern Express Company, to prevent it from attempting to compel its shippers to pay the amount of the tax.

This commission says, among other things:

"The person expressly charged with the duty to issue the bill of lading, is also impressed with the implied duty of providing the agencies and instrumentalities necessarily incidental to the performance of the duty expressly enjoined. Since he is bound to issue a bill of lading, and cannot issue it without its being first stamped, the duty of stamping is necessarily incidental to, and consequently included in, the duty to issue. * * * If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty of failure to

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stamp and cancel the same, would most naturally have been directed against the person who had, in accepting the bill of lading subsequently failed to stamp it."

Assistant Attorney General Boyd, in an opinion rendered in July, 1898, says:

"The purpose of the law is clear. It was to tax the carrier, and not the shipper, and these provisions undoubtedly fix upon the express companies and other carriers the duty of providing, affixing and canceling the stamp; and their failure to so provide, affix and cancel such stamp, subjects them to the penalties provided by law."

We are advised that the same ruling is made by U. S. Commissioner Hunter, of Ottumwa, Iowa, and by the Attorney General of Texas.

If our contention that Congress intended to impose upon the express company the obligation to pay the stamp tax for all merchandise accepted by it for transportation, is correct, then the only question remaining under the act, in our view, is whether or not the company can shield itself from this obligation by refusing to *accept* goods for transportation, unless the stamp tax is paid by the shipper

This involves apparently two questions:

(a) The common law obligation of the respondent to receive for carriage, and to carry the goods of any person tendered to it for transportation, upon the ordinary charges being paid or tendered; and

(b) The right to avoid this obligation or duty of providing the stamp tax, *under the guise of regulating rates, by which the obligation shall be imposed upon the shipper.*

We have already, heretofore, discussed in our brief, the obligation of the company, as a common carrier, to re-

ceive for carriage and to carry all goods of any person tendered to it for transportation, upon the payment of proper charges, (ante, p. 10, *et seq.*,) and the authorities seem to sustain this proposition to its fullest extent.

Can the company relieve itself of this obligation under the guise of regulating rates?

As said by the Supreme Court of Michigan: "The pretense that raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."

There has in fact been no *regulation* of rates, and it is idle for the company to so contend. The only so-called regulation consists in charging the shippers, in each instance, with the amount of the stamp tax, and requiring payment in advance.

In paragraph 9, of respondents' answer, it says: "That under its right to regulate its manner of doing business, and to regulate its rates, and with a view, as far as possible, under the circumstances, of accommodating the public, so far as paying said increase of rates, *respondent has accorded to responsible shippers, the right to pay such increase, (either using a stamp or money for the purpose,) upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee.*"

Paragraph 10: "*Respondent admits that the regulation of its business affairs and change in its rate of transportation as above stated, in effect throws the burden of the said tax upon the shipper by force of circumstances.*"

It is apparent, therefore, that there has been no regulation of rates, so-called, but an arrangement whereby the amount of the stamp tax,—in each instance one cent,—is

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imposed upon the shipper, irrespective of distance, weight or bulk of package, and former fixed charges. "Where the charge established was 25 cents, it is now 26 cents; where it was 50 cents it is now 51 cents; where $1.00 it is now $1.01, and so on, adding just one cent to each charge."

In considering this question, the Supreme Court of Michigan say:

> "It is apparent upon the face of this proceeding, that the very purpose of this change in the regulations, and the increase of rates, is to avoid the payment of the tax, and thus cast upon the shippers the burden which the act of Congress puts upon the company. *This is but an evasion, and a subterfuge to avoid the terms of the act.* The pretense that raising the charges on each package just one cent without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."

Judge Tuley says:

> "It is apparent, therefore, that in demanding this tax of the shippers, the express company has made no revision of its rates, nor in fact fixed any increased rate, and that it is simply an effort of the express company to make the shippers pay the tax, levied, as I have stated, upon the business transactions of the company, by the agency or means of a stamp tax upon the bills of lading, which the company is required to issue. It is not a revised increase of rate, because it adds to the former rate the same amount in each case or transaction." * * * *

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"The power to revise its rates and fix a reasonable charge, or rate, does not authorize it to arbitrarily increase all its rates by a horizontal increase thereof, without regard to whether such increase leaves a rate as to any particular shipment, a reasonable or unreasonable one.

The stamp tax is necessarily an arbitrary one. It may be imposed by the government without regard to values or the amount of the transaction, or the cost or expense attending the transaction. *The tax is the same on a receipt for a parcel that may be delivered by hand within a block or two, as it is on a receipt for a package that has to be several times handled and carried thousands of miles by the express company.* The express company has not the power of the national government, and can not, in a like arbitrary manner, add to its rate for performing its duties as a common carrier.

If it is an increase of rate, this is what it has attempted to do, but, as before stated, it is not in fact a revision or increase of rates, but it is an arbitrary attempt of the company to make the shipper pay a tax which the law requires the company to pay. The court must regard the substance of the contention and not the pretense."

Judge Frazer, of the Michigan Circuit Court, delivered a clear and comprehensive opinion in this matter.

Upon this question of regulation of rates, he says:

"It is true, as I look at this question, that the Express Company, the respondent, had a

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right to determine, within reasonable limits, what its charges would be for the transportation of goods through its office or offices ; but the right to determine and make reasonable charges for the transportation of goods is, in my opinion, a different thing from the increase of rates which had heretofore been deemed reasonable, for the purpose of avoiding the payment of the tax directed by Congress for raising of revenue for the carrying on of the war. *In my opinion, this increase of amount charged for the transportation of packages, is not in any sense for the purpose of meeting any additional expense that the Express Company may be put to for the carring or transportation of these packages, but was added for the express purpose, as is practically admitted in this case, of transferring the burden of paying a portion of the revenue necessary to carry on the war from the shoulders of the Express Company to those of its patrons.* The raising of the rate of one cent upon each parcel is, in effect, to impede the operation of the law, and therefore illegal. I do not believe, under any view that may be taken of the law, that any court could properly encourage a corporation or person in thus avoiding a duty which is clearly imposed upon it by the act of Congress. *It would be against public policy to allow the just burden imposed by the law-making power to thus avoid it, and it is clearly apparent to the court that this was the intention of the respondent.* It may be burdensome upon the respondent to have to pay this tax. All taxes

> are burdensome. But, as it is imposed clearly by the law making-power, it is the duty of the courts, regardless of consequences, to enforce it." (post, p. p.)

While it may be conceded that the Express Company, as a common carrier, has the authority in general to fix, regulate and establish rates, yet the rule unquestionably is, that any increase or regulation *must be reasonable.*

> "As they hold themselves to the world as common carriers for reasonable compensation, they assume to do and are bound to do what is required of them in the course of their employment, if they have the requisite conveyances to carry, or are offered a reasonable or customary price."
>
> *Kent's Com., (13 Ed.,) Vol. 2, p. 599.*
> *Express Co. vs. Maine Cent. R. Co., 57 Maine, 188.*
> *Am. & Eng. Ency of Law, Vol. 8. pp. 902-928.*

In *C. B. & Q. R. R. Co. vs. Iowa, 94 U. S., 155,* this court, in referring to railroad companies as carriers for hire, say :

> "This company, in the transaction of its business, has the same rights and is subject to the same control as private individuals under the same circumstances. It must carry, when called upon to do so, and *can charge only a reasonable sum for the carriage.*"

The criterion, therefore is, whether the attempt of the Express Company to shirk its responsibility for this public burden, in common with other corporations and individuals, and to shift the burden and responsibility upon

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shippers and consignors, *is a reasonable regulation of rates.*

We submit that it is not so; that the company, therefore, cannot refuse to perform this common law obligation of accepting and transporting merchandise which, according to the showing in this case, it has refused to do.

The government has refused to interfere in the matter of compelling the express companies to perform its obligations as a carrier. It holds, substantially, that it is interested only in the question of the payment of the stamp tax, in case of actual shipment. The company has refused to perform its obligations which it owes to the public as such.

The Supreme Court of Michigan affirmed the order of the lower court granting a mandamus upon the company compelling it to perform this common law duty. We submit that this decision was correct, and that the judgment should be affirmed.

III.

We hesitate to enter upon a discussion of other points made by respondent's counsel in the court below. At the time of preparing this brief, we have not been served with a brief in behalf of plaintiff in error, and we are, therefore, unable to determine definitely what points will be presented by counsel for the respondent.

This court is only interested in the "*Federal question*," if such exists, and has been properly presented in this controversy.

Barbier vs. Connolly, 113 U. S., 27.
Ashley vs. Ryan, 153 U. S., 436.
Watson vs. Mercier, 8 Peters, 88.

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In the petition for the writ of error, counsel contends that the Circuit Court had no jurisdiction to hear and determine said matter, and that, under the facts set forth in the answer, the court should have dismissed the application.

It was contended upon the argument in the Supreme Court of Michigan:

1st. That the defendant was a "*joint stock association*," and therefore was not governed by the Michigan practice under Circuit Court Rule 46, providing that *Circuit Courts shall have jurisdiction within their respective counties in all mandamus proceedings involving*" * * * "*the actions of any private corporation or officer or board thereof.*"

2nd. That the petition was not filed by the Attorney General at the relation of the people of the State, but upon the relation of private parties named therein as commercial partnerships.

3rd. That the petition showed no such interest in the petitioners as justly called for the interference of the court by the writ of *mandamus*.

4th. That the Federal Courts had exclusive jurisdiction of the controversy.

The Supreme Court of Michigan disposed of all of these questions adversely to the respondent.

FEDERAL COURTS HAVE NOT EXCLUSIVE JURISDICTION.

Referring to the point, that the Federal Courts had exclusive jurisdiction, the court say:

> "This is not an action for the recovery of the penalty which the statute imposes for failure to issue the bill of lading, but a proceeding for an order to compel the respondent, a common carrier, to accept and carry the

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goods tendered it for shipment when the regular charges are paid or tendered. The respondent is a common carrier, and as such, it is its duty to receive for carriage and to carry the goods of any person tendered to it for transmission, provided they are such as it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges. The respondent is permitted to do business in this state, though not incorporated under the laws of the state, but it is subject to all the duties and obligations which the law imposes upon common carriers; and for a refusal to carry goods, when tendered and charges paid, the State courts may be appealed to for redress. This matter is entirely between the shippers and the company. This view is held by the Attorney General of the United States, in a recent opinion, in which he says, 'In all controversies arising between the shippers and express companies as to which one shall be required to bear the expense of the stamp, the general government has no direct concern under the war revenue law.'" * * * "The commissioner of internal revenue on August 1st, 1898, decided that the aggrieved parties, that is, the parties offering goods for shipment, when the company refuses to carry without payment of the stamp, *must depend for redress upon the common or the statute law of the State defining the obligations of common carriers.*"

The logic of this opinion we submit is irresistible.

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PROPRIETY OF WRIT OF MANDAMUS.

Referring to the propriety of the writ of *mandamus* to enforce the common law duty enjoined upon the common carriers, the Michigan court say:

> "The company is vested with the exercise of public functions under the permissive power of the State; and when it refuses to discharge the duties imposed by law, *mandamus* is the proper remedy to compel the discharge of that duty. The American courts have taken such occupations under their control, and, regarding them as public agencies, have enforced the common law, or the statutory law against them, and have not hesitated to grant the writ of mandamus against any party who, having assumed public duties, refuses to discharge them. Haugen *vs.* Water Co., 28 Pac., 244; Olmsted *vs.* Proprietors, etc., 47 N. J. Law, 311."

The propriety of the writ would seem to be clear. The respondent, vested with the exercise of these public functions, under the permissive power of the State, declines to perform them, unless the shipper shall pay the tax which, if our contention be correct, the company is bound to pay.

Mandamus is the usual and ordinary remedy, and its propriety is evident.

When a carrier refuses to discharge its duty to receive and carry freight, a *mandamus* or mandatory injunction may issue, at the suit of the State, to compel the discharge of such duties. Such a company, being a *quasi* public institution, is subject to especial obligations, and it is no defense to an application for such a writ, that the State has

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suffered no injury, and that private persons have an adequate remedy by suit at law.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Ed., p. 162, par. 2.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Ed., p. 161.

People vs. N. Y. Central, &c., Co., 28 Hun. (N. Y.,) 543.

Abbott vs. Johnston, &c., Co., 80 N. Y., 31.

Union Pacific R. R. Co. vs. Hall, 91 U. S., 343.

State vs. Hartford, 29 Conn., 538.

Ex parte Attorney General, 17 New Brunswick, 667.

Railroad Com'rs vs. Portland, &c., Co. 63 Maine, 269.

People vs. Colorado Central, &c., R'y Co., 42 F. R., 638.

Chicago, &c., R. R. Co., vs. Burlington, &c., R. R. Co., 34 F. R., 481.

Payne vs. Kansas, &c., R. R. Co., 46 F. R., 546.

People, &c., vs. N. Y. Central & Hudson R. R. Co., 28 Hun., 543, is a well considered case upon this subject. The court, per Davis, J., considers the obligations of common carriers in analogous cases at length, *and holds that there is no doubt that a railroad company is compellable, by mandamus, to exercise its duty as a carrier of freight and passengers; and that this duty may be enforced by the Attorney General of the state, in behalf of the people, and that even though the injured party, as a suitor, has an adequate remedy by private action for damages, yet*

that this does not preclude the state from its remedy by mandamus.

This public duty has been frequently enforced in the case of telephone companies, and it is held that such companies, being common carriers of news, all persons are entitled to equal facilities in the enjoyment of the benefits to be derived from the use of the telephone, *and that a writ of mandamus will issue to compel such company to furnish such person with the necessary instruments.*

State vs. Telephone Co., 17 Neb., 126.
Central Union Tel. Co. vs. Bradbury, 106 Ind., 1.
Central Union Tel. Co. vs. State, 118 Ind., 194.
Commercial Union Tel. Co. vs. New England Tel. Co., 17 At. Rep., 1071.
State vs. Telephone Co., 23 F. R., 539.
Telephone Co. vs. Com., 3 Atl. Rep., 825.

In *State vs. Hartford, &c., R. R. Co., 29 Conn., 538,* it was held that a *mandamus* was properly applied for by the *Attorney General* of the state, to compel a railroad company to run passenger trains to its original terminus.

The court say:

> "*All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by mandamus to do it.*"

See also:

People, ex rel Garbutt, vs. Railroad Co., 14 Hun (N. Y.,) 371.
People, &c., vs. N. Y., &c., R. R. Co., 40 Hun., 571.

People, ex rel Town, vs. Troy, &c., R'y Co., 37 How. Pr., (N. Y.,) 427.
State vs. Wilmington Bridge Co., 3 Har. Rep. (Del.), 312.

In Michigan, the rule is, we think, clear that a proceeding of this character must be instituted by the Attorney General of the state, unless the private or particular interest to be subserved by the individual, is to be preserved and protected, *independent of that which he holds in common with the public at large, and that it is for the public officers exclusively to apply, where public rights are to be subserved.*

People vs. Inspectors, 4 Mich., 187.
Smith vs. City of Saginaw, 81 Mich., 123.
People vs. Regents, 4 Mich., 98.
People vs. Green, 29 Mich., 121.
People vs. Supervisors, 38 Mich., 421.
People vs. State Auditors, 42 Mich., 422.

In *People vs. N. Y., &c.. R. R. Co., 28 Hun., (N. Y.), 543-553*, a mandamus was applied for and granted, requiring railroad company to discharge its duty as a common carrier, by promptly receiving, transporting and delivering all freight. It was contended that the state was not injured, and had no interest in the question.

The court say:

> "The state may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the state in either case. *The sovereignty of the state is injured whenever any public function vested by it in any*

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person, natural or artificial, for the common good, is not used or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the state, and thereby, in a legal sense, injures the entire body politic. The state, in such a case as this, has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties."

Citing cases:

"*But that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue.*

"Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the court to judge whether the elected remedy should be applied. But upon the question of power, and of sufficient legal injury to justify its use, where the corporation neglects or refuses to exercise its franchises or perform its duties, there seems to us no reason to doubt."

The function which the express company refuses to exercise is a public one. The interest sought to be subserved is common to all the people of the state. The sovereignty of the state is wounded by the refusal of the express company to perform its duty as a common carrier,

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as contemplated by the state, when it permitted the company to come within its borders and carry on its business. The injury is common, and the course and practice of the respondent, as admitted by its answer, is uniform. (Pet., Par. 8; Ans. Par. 2.)

SCOPE OF THE WRIT.

It is further contended that the scope of the writ of mandamus, as granted by the lower court, is too broad; and that such court had no right to enforce the performance of duty by the respondent company, *except as to the particular relators mentioned in the petition.*

Regarding this contention, the Supreme Court of Michigan say:

> "The petition is filed by the attorney general of the state, in which it is stated that these cases constitute but few of the many of like character, and are presented for the purpose of representing the uniform course of practice of the respondent company. This is not denied by the answer, but, on the contrary, the claim is made therein that the regulation of its business affairs and change in its rates of transportation, throw the burden of the tax upon the shipper by force of circumstances. It is thus apparent that the attorney general's petition, taken with the answer of the respondent, is sufficient to show that the respondent is attempting to enforce this rule throughout the state in its dealings with all its customers, and the case involves the question whether the order should be broad enough to reach the rights of all classes who are shippers within the state. We think the order should not be modified as claimed."

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This question should present no practical difficulty. A proceeding by mandamus of this character is analogous to a proceeding by the attorney general of the state on the relation of tax payers, to set aside or vacate a tax.

The attorney general may institute the suit with perfect propriety of his own volition, and the fact that the suit is upon the relation of certain persons, is of no particular significance. A bill filed by the attorney general, or by certain citizens as tax payers, to restrain the collection of an invalid tax, is set aside and vacated as to the entire tax payers, and not in favor of those only who happen to be relators.

In the case at bar, the proceeding is instituted by the attorney general of the state, setting out in fact the exercise of public functions by respondent as a corporation.

As said in the case of *People, &c., vs. N. Y. C. & C. R. R. Co., supra*, the acts of the respondent, in refusing to exercise this public function by receiving, accepting and transmitting merchandise, unless the public pays the burden, which the law imposed upon it as an express company, wounds the sovereignty of the state in a legal sense, and it is not only the right, but the duty of the state to interfere.

In *Merrill on Mandamus, Sec. 25*, the author says that American courts have taken such occupations under control, and, regarding them as public agencies, have enforced the common law, or statutory law, against them, and have not hesitated to grant the writ of mandamus against any party who, having assumed public duties, endeavored to be partial in the performance of such duties, and attempted to give one party an advantage over another. Citing:

Nash vs. Page, 80 Ky., 539.
People vs. King, 110 N. Y., 418.
People vs. Budd, 117 N. Y., 1.

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Chicago, etc., R. R. Co. vs. Iowa, 94 U. S., 155.
Peik vs. Chicago, etc., R. R., 94 U. S., 164.

The precise question, however, was considered in the case of *People, etc., vs. N. Y. C. & H. R. R. R. Co., 28 Hun., 543-559*, where the court say :

> "We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of mandamus in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kind of goods should be first received and carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ on their own behalf, and not for some private suitor, or to redress individual injuries. The prayer of the petition indicated the proper form of the writ."

This language is so apt and so forcible, and meets the proposition so squarely, that other argument would seem to be unnecessary.

POWER OF THE COURT BELOW.

Regarding the contention that the circuit courts of the state had no power to issue the writ of mandamus, inasmuch

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as circuit court rule 46 conferred jurisdiction in mandamus proceedings upon the circuit courts of the state involving the actions of private corporations only, and that, therefore, the rule did not apply to "*joint stock associations*." the Supreme Court of Michigan say :

> " 'Corporations' and 'associations' are convertible, and often used as synonymous terms. There is no reason for any distinction or discrimination between corporations and joint stock associations, in applying this rule. It is the intent of the rule to place all mandamus proceedings of this character primarily in the circuit courts. In reference to the assessment and collection of specific taxes, the legislature of this state has recognized the terms as convertible. Section 1255, 1 How. Stat., provides, 'The term *corporation*, as used in this act, shall be construed to include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships.' In *Maltz vs. Express Co., 1 Flip., 611, Fed. Cas. No. 9002*, it was held, that whether a corporation or not, a joint stock association is a distinct legal entity, and that so long as this fact exists, and it possesses the attributes of perpetual succession, and the capacity of suing and being sued, it is a judicial person, and must be regarded as a citizen of the state which creates it ; and it is wholly immaterial whether it be termed an 'association,' 'joint stock association,' or 'guild.' "

There is no reason for any distinction or discrimination as between a corporation and a joint stock associa-

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tion. The word "corporation" is a convertible term, and is used as synonymous with the term "joint stock association." This term, "association" is used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.

Am. & Eng. Ency. of Law, Vol. 3, 2nd Ed., p. 162.

The term corporation is frequently construed to include all associations and joint stock companies, having any of the powers or privileges of corporations not possessed by individuals or partnerships.

See *Howell's Statutes, Vol. 1, Sec. 1255.*

The *Constitution of the State of New York* provides as follows:

"Article VIII.

"Sec. 1. Corporations may be formed under the general laws; but shall not be created by special act *except for municipal purposes*," &c.

"Sec. 3. The term *corporation*, as used in this article, shall be construed to include *all associations and joint stock companies having any of the powers or privileges of corporations*, not possessed by individuals or partnerships," &c.

In *Sandford vs. Supervisors, 15 How. Pr., 172*, it is held that joint stock associations, being corporations within the meaning of the constitution, they are liable to taxation on their capital like all other corporations.

At p. 176, the court say:

> "I think, therefore, that in obedience to the express mandate of the constitution and to long and well established legal principles,

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we must hold that these associations or companies, formed under these general laws, are corporations, and that if the legislature has declared that such associations shall not be corporations, after conferring on them, in accordance with the constitution, some of the powers and privileges of corporations, and which admit that if any such powers and privileges are conferred, they shall be deemed corporations, such legislative declaration must yield to the constitution and be regarded as inoperative." * * * *

"Having arrived at the conclusion that *this joint stock association is a corporation*, within the meaning of the constitution, it follows that it is liable to taxation on its capital like all other corporations." Citing,

Mutual Ins. Co. vs. Supervisors, 4 Com., 444.

In England and in this country, the law of joint stock companies is largely regulated by statute. The powers conferred upon them by these enactments are such that for many purposes *they are held to be corporations*, even though they have nowhere been designated as such, and though the statutes relating to joint stock companies do not so designate them.

Beach on Private Corporations, Vol. 1, Sec. 167.
Oliver vs. Ins. Co., 100 Mass., 531.
Thomas vs. Dakin, 22 Wend., 9.
Supervisors vs. The People, 7 Hill, 504.
Leavitt vs. Blatchford, 17 N. Y., 521, 529.
Talmage vs. Pell, 7 N. Y., 328.
Gillett vs. Moody, 3 N. Y., 479.

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Gifford vs. Livingston, 2 Denio, 380.
Case vs. Mechanics' Banking Ass'n, 1 Sandf., 693.
Cutler vs. Sanford, 8 Barb., 225.
Bank, &c., vs. Watertown, 25 Wend. 686.
In Re Bank of Dansville, 6 Hill, 370.
People vs. Niagara, 4 Hill, 20,
Willoughby, vs. Comstock, 3 Hill, 389.
People vs. Watertown, 1 Hill, 616.
People vs. Wemple, 52 Hun., 434.

In *U. S. vs. Trinidad Coal Co.*, 137 U. S., 160, a *corporation* was held an *association* of persons within the meaning of the U. S. statutes relating to the vacant coal lands of the government, and as such was subject to the restriction as to the number of acres of such land that might be entered in its name.

In this case, the court say :

> "The reasons that suggested the prohibitions in respect to *associations* of persons apply equally to *incorporated and unincorporated* associations; but the purpose of the government would be defeated altogether if it should be held that *corporations* were not *associations* of persons, within the meaning of the statute."

In *Maltz vs. American Express Co.*, 1 *Flippin*, (*U. S. C. C.*,) 611, it was held that whether a corporation or not, a joint stock association is a distinct legal entity, and so long as this fact exists, and it possesses the attributes of perpetual succession, and the capacity of suing, and being sued, it is a judicial person, and must be regarded as a citizen of the state which creates it.

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The court say :

> "I deem it wholly immaterial whether it be termed an *association, joint stock association* or guild."

In *Am. & Eng. Ency. of Law, Vol. 11, 1st Ed., p. 1054, note 2*, the author says :

> "It seems to comport with reason that when an association of persons assume a name which implies a corporate body, and exercises corporate powers, they should not be heard to deny that they are a corporation." Citing :
>
> *U. S. Express Co. vs. Bedbury, 34 Ill., 459.*
>
> *Clarkson vs. Erie & North Shore Dispatch, 6 Bradw., (Ill.), 284.*

The word "association" is said to signify "confederacy or union for particular purposes, good or ill." *Johns. Dict.*

In that sense it is a generic term, and may indifferently comprehend a voluntary confederacy, which is a partnership dissoluble by the persons who formed it, *or a corporate confederacy*, deriving its existence from a statute, and dissoluble only by the law.

See *Thomas vs. Dakin, 22 Wend., 104.*
Exchange Bank vs. Hines, 3 Ohio State, 32.

In New York, associations, under the general banking law of the state, are corporations.

Niagara County vs. People, 7 Hill, 504.
Gillett vs. Moody, 3 N. Y., 479.
Talmage vs. Pell, 7 N. Y. 328.

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In *Lee Mutual Fire Ins. Co. vs. State, 60 Miss., 398*, associations and companies were held to be *synonymous.*

Grotius called a corporation "*consociatio,*" which signifies "*association,*" and applied the term to a people which is properly considered a corporation in respect to its powers with respect to individual action and ownership.

See *Thomas vs. Dakin, 22 Wend., 104.*

People ex rel Clap vs. Wemple, 52 Hun. (N. Y.) 434.

In this case, the U. S. Express Company refused to make reports to the controller of the city of New York, and the controller thereupon proceeded to settle, fix and determine the amount of taxes and penalties due and unpaid from said company to the state of New York.

The question presented was whether the U. S. Express Company was taxable under the 3rd section of Chapter 542, of the Laws of 1880. The express company was an association formed by articles of agreement, signed by five or more persons.

The court say, p. 438:

> "*The word corporation may sometimes be used to include joint stock companies, so it may not be inconsistent to speak of a joint stock company as being also a corporation.*"

After referring to the case of *People vs. Home Ins. Co., 92 N. Y., 329*, the court say:

> "The very section in question used the *words* 'corporate franchises or business,' after naming the bodies subject to the tax, and if anything is to be drawn from that opinion it is *that these joint stock associations are corporations*, for the court say, at page 340, that the aforesaid act of 1881, after describing a corporation subject to its pro-

visions, continues as follows: *thus including joint stock companies and associations under that name of corporations.*"

The answer practically concedes our contention, because it says, (paragraph 7) that the respondent, regularly organized and existing under and by virtue of the laws of New York, and acting under regularly issued license of this state, by its organization and compliance with the laws of the state, as admitted in paragraph 5 of said petition to have been done, *became vested with the right to exist in a corporate capacity.*

The Supreme Court of Michigan, which established and adopted the rule, has construed it to apply to joint stock associations, and we submit that this is conclusive upon this question.

The writ of mandamus, as granted by the court below, required the company—

"So long as you, the said American Express Company, shall continue to do business in the State of Michigan, that immediately after the receipt of this, our writ, you do receive and accept for transportation and delivery, any and all goods, wares and merchandise offered or tendered to you, the said express company, whether in boxes, bales, packages or bundles, or not so enclosed or included, as a carrier, from point to point, upon the lines of said company, upon the usual fees therefor being paid or tendered by the shipper, or consignor, his agent or servant, and to issue to the said shippers or consignors, or their agents, or the persons from whom any goods shall be delivered as aforesaid for transportation, a bill of lading, manifest, or other evidence of receipt or forwarding for each shipment received for carriage or transportation, with a revenue stamp of the value of one cent duly at-

tached thereto, and canceled as provided by an Act of Congress, entitled, 'An Act to Provide Ways and Means to Meet War Expenditures, and for other purposes,' approved June 13th, A. D. 1898, and without requiring a stamp of the value of one cent, or the equivalent thereof provided by said Act of Congress to be furnished by said shipper or consignor, or his agent or servant."

The company had refused to perform a public duty. The attorney general, representing the people of the state, on the relation of certain firms (who should be responsible for costs) instituted these proceedings. The relators were only important as mediums for setting the wheels of the court in motion. The relief was sought in behalf of the entire public, who were affected by the action of this company in the exercise of a public function, and to hold that the relief in such cases can apply only to the particular relators upon whose motion the proceedings were started, would bring reproach and discredit upon the efficiency of courts of justice.

We apprehend that the court will not be disposed to consider these collateral questions, in view of the fact that they do not of themselves present any Federal question. We have presented our argument, however, upon the theory that this court might be disposed to consider some of them.

We therefore ask:

1. That the writ of error in this case be dismissed upon the ground as indicated by the motion heretofore submitted, that no Federal question has been raised by the respondent, but only the question of the common law right of the respondent to charge the tax in question over to the shipper, under the guise of regulating its rates.

2. That in case this relief shall not be granted, then that the judgment of the Supreme Court of Michigan upon the merits of the controversy, be affirmed.

C. E. WARNER,
Att'y for Def't in Error.

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APPENDIX.

OPINION OF JUDGE TULEY.

SUPERIOR COURT, COOK COUNTY.

Petition for Mandamus.

OPINION RENDERED JULY 28, 1898.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. WESTERN WHEEL WORKS, a corporation *v.* THE UNITED STATES EXPRESS COMPANY.

By agreement of counsel for the respective parties, argument was heard upon above petition before the Honorable M. F. Tuley, one of the judges of the Circuit Court of Cook County, on Monday, July 25, 1898.

TULEY, J.—The relator in this case, the Western Wheel Works, an Illinois corporation, engaged in business in Chicago, it is alleged was in the habit of shipping by the defendant, the United States Express Company, a large number of packages daily, sometimes amounting to between one and two hundred a day.

About the 8th of July, 1898, and after the passage of the act of Congress, known as the "War Revenue Act," it sent a package to the office of the express company for shipment to a point called Pine Bluff, in the State of Arkansas. The rate charged by the express company had been, as appears by the evidence, forty-five cents for a package of that character, for the last six or eight years.

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When the package was tendered to the company, the evidence shows that the agent started to fill out a blank bill of lading or receipt for the shipment, and observing that the party making the shipment counted out forty-five cents to pay the charges, the agent demanded that he should pay in addition one cent for a revenue stamp to be attached to the bill of lading, and upon his refusal to do so, the company, by its agent, refused to accept the parcel for transportation.

There is some little difference in the evidence as to what occurred at the time of the presentation of the package, but there is no doubt of this fact, that the agent refused to receive the package unless the one cent for the revenue stamp was paid in addition to the forty-five cents, which is the material fact in the case.

Thereupon, this petition in the name of the People, on the relation of the Western Wheel Works was filed.

The company filed an answer denying in general all the allegations of the petition as to the facts alleged in the petition.

The question involved in this case is, upon whom, under the act of Congress, is the obligation imposed to pay the stamp tax, the express company or the shipper?

That depends, first, upon the construction to be placed primarily upon the portion of the Stamp Act, referring to and headed "Express and Freight," taken, of course, in connection with all other relative provisions of the act of Congress.

The section refers to express companies, railroad corporations, persons, etc., engaged in the business of carrier for hire, and requires them to issue bills of lading, etc., or evidence of the receipt of property, for each shipment received. It is conceded that the language is sufficiently broad to cover express company receipts, which are, in fact, nothing more than bills of lading. The section, as

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applicable to express companies, eliminating what refers to other companies, would read as follows: "It shall be the duty of every express company * * * to issue to the shipper * * * or persons from whom any goods are accepted for transportation, a bill of lading * * * for each shipment received for carriage or transportation * * * and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading * * * a stamp of the value of one cent. * * * Any failure to issue such bill of lading * * * as herein provided, shall subject the express company * * * to a penalty of fifty dollars for each offense, and no such bill of lading * * * shall be used in evidence, unless it shall be duly stamped as aforesaid."

The act of Congress referred to is entitled, "An act to provide ways and means to meet war expenditures and for other purposes."

It aims to raise the revenue to meet war expenditures by taxation.

The Supreme Court of the United States, in what is called the Foreign Bond Case, 15th Wallace, uses this language in regard to the subject-matter of taxation: "The subjects of taxation are *persons*, *property* and *business;* whatever form taxation may assume, whether as duties, imports, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a variety of ways."

The subjects of taxation referred to in the act, among others, are the railroad companies, express companies, and other common carriers, steamboats, etc., telephone, life insurance, and various other businesses and occupations.

It was not the intent to tax the corporation or *person* engaged in the express business. It was not intended to tax the *property* or capital stock employed by such cor-

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portation, or person, in such business. It must, therefore, be the *business* of the corporation or person engaged in the occupation of a common carrier which the law intends to tax. The business must be taxed, not on its receipts, nor according to its extent, but by levying and collecting a tax for and in respect of instruments (bills of lading, receipts, etc.,) mentioned in Schedule A, or for, and in respect of, the vellum, parchment or paper upon which such instrument shall be written or printed. (See Section 6.)

That is to say, the act is an exercise of the power to tax the business of the express company by way of or by means of imposing a stamp tax on its bills of lading or receipts, which it is compelled to use in the transaction of its business.

How has the law making power exercised its taxing power, and has it done so in a manner clear and free of any reasonable doubt?

The section quoted, headed "Express and Freight," makes it the duty of the express company to issue with each shipment or package received a bill of lading (or receipt, I use them interchangeably).

What is meant by "duty?" The meaning in law is "that which a person is bound by any legal obligation to pay, do or perform."

The express company is put under a legal obligation to do what? To issue a bill of lading.

What is it "to issue?" To "issue" is to send out, to send forth, as to issue an order of a commanding officer, or to issue a writ or precept of the court.

The bill of lading or receipt must be sent forth, parted with, or, in other words, issued by the express company.

Must be issued to whom? The law is clear, to the shipper, consignor, agent or person from whom the goods are accepted for transportation.

But what kind of a bill of lading is the express company under legal obligation to so issue to the shipper?

It would be an absurd conclusion to say that the company is required to issue to the shipper an unstamped bill of lading or receipt, the issuing of which is made a penal offense by section 7 of the act.

It was not the intent of the statute to place the express company under an obligation to do an illegal act. The bill of lading, or receipt, that the express company is to issue, must be a complete bill of lading, a legal instrument, and this can only be a stamped instrument. This is the clear intent of the section, because it not only requires the express company to issue a bill of lading, but proceeds, "and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading * * * a stamp of the value of one cent. * * * Any failure to issue such bills of lading * * * as herein provided, shall subject the railroad, express company, etc., to a penalty of fifty dollars."

The penalty is imposed for a failure to issue a bill of lading with the stamp attached.

The word "such" qualifies all that goes before in connection with the bill of lading, and must by all rules of construction be held to mean a bill of lading with the stamp attached.

It is contended that the section quoted does not expressly state that the express company shall attach and cancel the stamp. It is, however, a necessary inference that it shall do so. It is made its duty to issue the bill of lading; it can only issue a legal bill of lading, and that is one duly stamped. The shipper has nothing to do with the issuing—the sending forth of the bill of lading. The stamp must not only be affixed, but must be "canceled," as in the act provided.

Section 9 of the act provides that "where an adhesive

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stamp shall be used for denoting the tax imposed by the act, the person using or affixing the same, shall" cancel the stamp in a certain manner therein specified.

If the duty of the express company is to issue a complete—a legal bill of lading, it must be one with the stamp affixed and canceled, and the company can only fulfill that duty by so affixing and canceling the stamp. This would appear to be a necessary inference from the duty imposed by the act.

It is contended that this construction put upon the words, "such bill of lading," would, if applied to the same words in the next following provision, prohibiting the reception by the courts of "such bills of lading," as evidence, unless duly stamped, make the law mean that no stamped bill of lading should be received as evidence. Such a construction could not be made, as it is opposed to the very spirit and intent of the act. A court is not disposed to be hypercritical as to the use of words by the legislative body if it can discover the purpose and intent of the legislature, and, if necessary, it will, in construing the act, reject as surplusage a word that is inadvertently used.

Congress has no power to prescribe to courts what they shall or shall not receive as evidence; that is so held in the case of *Craig vs. Dimick*, 57 Ill., 308. Although Congress has no power to prescribe to courts what they shall or shall not receive as evidence, the court would not construe the act as an attempt by Congress to dictate to the court what it should or should not receive in evidence, but will construe the sentence referred to, as intended to provide a further method of enforcing the payment of the stamp, and will, undoubtedly, aid the legislative power in the collection of its revenue by refusing to receive in evidence such instrument not stamped, or at least until the stamps shall have been first affixed.

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There is some language in section 6 of the act which is relied upon to show that the tax may be paid, either by the express company or by the shipper. The section provides "that there shall be levied, collected and paid for and in respect of the bonds, instruments, etc., matters and things mentioned and described in Schedule A of this act, and for or in respect of the vellum, parchment or paper upon which said instrument, matters or things, or any of them, shall be written or printed—by any person or persons or parties who shall make, sign, or issue the same, or for whose use and benefit the same shall be made, signed and issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified, or set forth in the said schedule."

These are general words applicable to all the numerous documents, instruments, business, etc., enumerated in Schedule A.

The words, "for whose use or benefit the bill of lading shall be made, signed or issued," may be held to apply to the principal, where the transaction or the making of the receipt is done by an agent or broker; but there are matters specified in Schedule A where it is clearly intended that the party for whose use or benefit the bill of lading is made, shall pay the tax, as for instance, where entries are made of goods at the custom house, and a receipt or certificate given therefor, and also entries for the withdrawal of goods or merchandise from customs bonded warehouse, and a receipt or certificate therefor given. But such general language used to designate all persons or classes of persons who may under any provision of the act be required to pay the stamp tax, will not be allowed to cast any doubt upon the express provision of the act requiring the express company to issue a receipt to the shipper.

It is, however, contended by the defense, that a common carrier may stipulate as to the terms of his contract,

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and that the court can not prescribe the terms or price of transportation by the carrier; that in demanding the payment of the tax as an addition to the fixed rate, it has only exercised its right to make and fix reasonable rates.

It must be admitted that when the increased costs of handling and transportation demand it, a common carrier has the right to revise and increase his rate, but he can not arbitrarily do so in order to make his customers or the public pay a tax imposed by law on such carrier or upon the business transacted by him.

The real contention between the shipper and the express company is as to who shall pay this tax, and the express company is endeavoring to make the shipper pay it.

The evidence shows that after the passage of the act and before it went into effect, to-wit: on June 29th, the company's general agent issued a certain circular to all shippers of fruit and produce, etc., informing them of the going into effect of the new law on July 1, 1898, and that it requires the company to see that a revenue stamp of one cent is affixed to each express receipt issued; that the company will decline to receive any shipments offered to go by express unless they are entered upon the regular express receipts used by the company, and a one cent revenue stamp affixed to each receipt, and "shippers will be expected to pay to the company one cent for each receipt isued."

A letter of instructions by the general agent was also issued about the 29th of June, with reference to the same matter. "A receipt must be given for all express matter," it states, "and stamps must be canceled with the letters, 'U. S. X.,' and date in ink, indelible pencil or rubber stamp, by the party signing the receipt; the value of the stamp must be collected from the party to whom the receipt is given."

"Canceling stamps will be furnished. Receipts for

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dead-head matter require a one cent stamp, which must be collected of shipper."

On July 1st, from the home office at New York, a general circular to all the agencies was issued in regard to the same matter, in which they are informed that a receipt must be issued "for each and every shipment of goods accepted for transportation over this company's lines." "To every receipt and duplicate thereof for a shipment of goods within the United States, there must be affixed a United States revenue stamp of the value of one cent." "The stamp, after being affixed, must be canceled by writing or stamping thereon with ink or with indelible pencil, the initials, 'U. S. X.,' and the date of the receipt." "In every case the amount of stamps must be collected from the party to whom the receipt is issued."

"Quotations of rates, etc. On and after July 1, 1898, all rates quoted must be 'plus the government stamp tax.'"

It is apparent, therefore, that in demanding this tax of the shippers, the express company has made no revision of its rates, nor in fact fixed any increased rate, and that it is simply an effort of the express company to make the shipper pay the tax levied, as I have stated, upon the business transactions of the company, by the agency or means of a stamp tax upon the bills of lading, which the company is required to issue.

It is not a revised increase of rate, because it adds to the former rate the same amount in each case or transaction.

The rate or charge, as fixed heretofore by the company, must necessarily give a larger profit in some cases than in others, and the cost of handling and transportation be greater in some than in others. It would therefore follow that in some cases the old rate for transportation might be a reasonable one, and might yield a reasonable

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profit, even if the express company should be obliged to pay this stamp tax.

The express company is a common carrier ; is carrying on a business affected with a public interest. It can not arbitrarily fix its own rates or make such a contract with each shipper as it pleases. It must treat all alike and must carry for all at a reasonable rate of charge. The power to revise its rates and fix a reasonable charge or rate does not authorize it to arbitrarily increase all its rates by a horizontal increase thereof, without regard to whether such increase leaves a rate as to any particular shipment, a reasonable or unreasonable one.

The stamp tax is necessarily an arbitrary one. It may be imposed by the government without regard to values or the amount of the transaction, or the cost or expense attending the transaction.

The tax is the same on a receipt for a parcel that may be delivered by hand within a block or two, as it is on a receipt for a package that has to be several times handled and carried thousands of miles by the express company.

The express company has not the power of the national government, and can not in a like arbitrary manner add to its rate for performing its duties as a common carrier.

If it is an increase of rate, this is what it has attempted to do ; but as before stated, it is not in fact a revision or increase of rates, but it is an arbitrary attempt of the company to make the shipper pay a tax which the law requires the company to pay. The court must regard the substance of the contention, and not the pretense

I remember, as a matter of personal recollection, that at the time of the going into effect of the Stamp Act during the War of the Rebellion, the express companies endeavored at that time to make the shipper pay the stamp tax, and the shipper did for a short time pay it, but it was soon changed, and the company paid it, whether in

pursuance of any decision or in pursuance of a ruling at Washington I do not know. I have not been able to find any decision upon the question.

I also recollect that the street railway companies attempted to add the one cent to their fare, but did not persevere in their attempt a great while.

The defendant raises a constitutional question, and that is, that if the act does require the defendant to pay for the stamp, it imposes a direct tax in contravention of the Constitution of the United States, within the meaning of the income tax decision of the Supreme Court of the United States.

I shall not pass upon that question, as it was not argued before me. At first glance I see nothing in the contention as to the unconstitutionality of the act.

Stamp Acts went into effect, I believe, in England, during the time of William and Mary; they are the recognized method of the means of taxation in all countries.

The Stamp Act was in force for a number of years during the war, and no decision is pointed out which at all intimates that it is unconstitutional.

At first glance I think there is nothing in the contention, but I will not pass upon it directly.

The relator contends that he is entitled to a continuing mandamus, while the defendant contends that the relief must be confined to the single transaction or shipment mentioned in the petition.

This relator is engaged in a business which requires it to send by express about two hundred parcels a day. To require that it shall seek a mandamus as to each shipment would be a travesty upon the administration of justice. Such a rule would leave the weak, that is, the shipper, at the mercy of the strong.

A more reasonable rule, and the rule contended for by the relator, prevails in this state.

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I have not had time to look up the authorities, but I remember the case of Nelson *v.* The Chicago & Alton Railroad Company so decides. See also C. & N. W. Ry. Co, *v.* People, 56 Ill., p. 365, and Vincent *v.* Chi. & Alton, 49 Ill., p. 33.

Let the writ of mandamus issue as to the shipment mentioned in the petition and as to all future shipments tendered by the relator.

OPINION OF JUDGE FRAZER.

THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

ATTORNEY GENERAL, on the Relation, etc.,
vs.
AMERICAN EXPRESS COMPANY, and CHARLES F. REED.

The petition in this case is filed for the purpose of procuring a mandamus to compel the American Express Company, respondent, to accept goods offered to it by certain shippers for transportation, and to receive and transport the same to their destination, and it is claimed that the express company refused to so transport the same, unless the shipper pay for the revenue stamp, which the law requires to be affixed to the receipt, which the express company is required to give to the shipper. The shipper having declined to do this, this application is for the purpose of requiring the American Express Company to so trans-

port said packages and to affix the required revenue stamp to the receipt.

The first question raised by the respondents is that the circuit court had no jurisdiction over the company, for the reason that the respondent, the American Express Company, is a joint stock association, and the only authority that the circuit court has to issue a mandamus is under Rule 46 of the Supreme Court, that "Circuit Courts shall have jurisdiction, within their respective counties, in all mandamus proceedings, involving the action of any officer or board of any county, township, city or school district, or of the common council of any city or village, and the action of any private corporation or officer or board thereof."

It is contended that under this rule, no power is granted to the Circuit Court to issue writs of mandamus as against such joint stock associations.

I am of the opinion that it was the intention of the Supreme Court to include all joint stock associations under the term private corporation. To hold otherwise would, in my opinion, be to put too narrow a construction upon the rule, for a joint stock association is to all intents and purposes a corporation, and I see no good reason why, under the term corporation, a joint stock association would not be included.

I think that the suit is properly commenced in the name of the Attorney General, although the remedy sought is by private parties.

The main question to be determined is, whether the shipper or express company shall pay for the revenue stamp required by the Act of Congress. The respondent, the American Express Company, being a common carrier, and the question being one of public interest, in which all shippers of goods are interested, and a common carrier being required to receive and transport goods, no matter by

whom offered, if proper rules and regulations made by the carrier are complied with, I see no impropriety in the intervention of the Attorney General in this matter, in the application for this writ.

In my opinion, the jurisdiction of this court, in the premises, cannot be successfully disputed, and the remedy sought can only be applied to the case in hand, and that is, to compel the respondents to receive and transport the goods and furnish a proper receipt in the case now actually before the court. I cannot see how any decision of this court can be made to affect or control any cases that may arise in the future.

It was claimed upon the argument that the petition did not state that the charges were paid, or offered to be paid, upon the packages that were offered for shipment; but this question was abandoned upon the argument, and it was left for the court to decide it the same as if these charges had been tendered; so the question of the tender of these charges to the respondent, the express company, is, by the agreement of counsel, eliminated from the case.

The serious question presented for the consideration of the court in this issue is, whether under the Act of Congress, passed for the purpose of raising revenue, it is the legal duty of the express company to attach to the receipt or bill of lading a revenue stamp such as the law requires.

As I understand, the law applying to this subject is found in Schedule A of the Revenue Law of 1898, and is as follows:

> "Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted

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> for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding, for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, or bundles, or not so enclosed or included; and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifest, or other memoranda, and to each duplicate thereof, a stamp of the value of one cent."

This is the main portion of the law applying to the question in hand.

It is manifest to me that it was the intention of Congress to require the Express Company to deliver to the person offering for shipment any goods or packages, a receipt for the same, and it requires said receipt to have attached to it a revenue stamp of one cent.

And the same act provides that "Any failure to issue the said bill of lading, manifest or other memorandum as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum, shall be used in evidence unless it shall be duly stamped as aforesaid."

From these provisions, it is clear to me that such a receipt would not be valid as evidence in any court of law, or good for any other purpose, were it issued without the said stamp being attached; and if the law requires—as it plainly does—the Express Company to issue this receipt, it requires the issuing of such receipt as shall be good in law, to wit: one with the proper stamp attached.

In the brief furnished me by counsel for respondents, it is claimed that the respondents decided to raise and did

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raise their rates on the shipment of various packages one cent, for the purpose of meeting the changed conditions made by the act of Congress referred to, and they claim that under this right to affix reasonable charges for the transportation of packages, they had a right to increase the amounts one cent for each package for the purpose of meeting the additional expense required by this stamp duty.

It is true, as I look at this question, that the Express Company, the respondent, had a right to determine within reasonable limits, what its charges would be for the transportation of goods through its office or offices; but the right to determine and make reasonable charges for the transportation of goods is, in my opinion, a different thing from the increase of rates which had heretofore been deemed reasonable, for the purpose of avoiding the payment of the tax directed by Congress for raising of revenue for the carrying on of the war. In my opinion, this increase of amount charged for the transportation of packages, is not in any sense for the purpose of meeting any additional expense that the Express Company may be put to for the carrying or transporting of these packages, but was added for the express purpose, as is practically admitted in this case, of transferring the burden of paying a portion of the revenue necessary to carry on the war, from the shoulders of the Express Company to those of its patrons. The raising of the rate of one cent upon each package is, in effect, to impede the operation of the law, and therefore illegal. I do not believe, under any view that may be taken of the law, that any court could properly encourage a corporation or person in thus avoiding a duty which is clearly imposed upon it by the act of Congress. It would be against public policy to allow the just burdens imposed by the law-making power to thus avoid it, and it is clearly apparent to the court that this was the intention

of the respondent. It may be burdensome upon the respondent to have to pay this tax. All taxes are burdensome. But, as it is imposed clearly by the law-making power, it is the duty of the courts, regardless of consequences, to enforce it.

It was said upon the argument that stamps were required to be affixed and put upon articles sold by individuals, such as proprietary medicines and the like, and that the price of the article was increased the amount of the revenue stamp, so as to require the purchaser to pay it. I think the principle in the one case is entirely different from that in the other. In the case of proprietary medicines, a purchaser need not purchase the article unless he sees fit; the seller is not required to sell it; they are private people, dealing with each other, and they can determine between themselves, and must determine between themselves, who must pay the revenue. But a common carrier, whose duty by law it is to transport these articles, is, in the nature, to say the least, of a *quasi* public body, with a duty imposed by law, and that duty cannot be avoided. They must transport the article; the law requires them to do it; and they must comply with all the conditions of the law before the article is so transported by them. The principles in these two cases are different. It is not a parallel case to say that private persons, dealing with each other, are to be judged upon the same legal principles as those involved in this case now before the court.

The writ of mandamus will issue.